

M E M O R A N D U M

TO: THE HONORABLE MAYOR AND
MEMBERS OF CITY COUNCIL

FROM: IGNACIO B. PESSOA
CITY ATTORNEY

DATE: FEBRUARY 24, 2007

SUBJECT: REFERRAL TO THE PLANNING COMMISSION OF A TEXT AMENDMENT
TO REQUIRE SMOKE-FREE RESTAURANTS

Issue: Referral to the Planning Commission of a text amendment to the Zoning Ordinance to require smoke-free restaurants.

Recommendation: That City Council consider making this referral and initiating the process of amending the Zoning Ordinance to require smoke-free restaurants in Alexandria.

Discussion: On February 15, 2007, City Council requested that the attached text amendment be docketed for consideration and possible referral to the Planning Commission. If the referral is made, the Commission will hold a public hearing, and make its recommendation to Council. The text amendment will then return to Council for a public hearing, and if approved by Council, will proceed to final adoption by ordinance, at which time Council will conduct a second public hearing on the ordinance.

In response to an inquiry from Mayor Euille, I noted that current Virginia law prohibits the City from adopting a direct ban on all smoking in restaurants and bars, of the type recently adopted in the District of Columbia and Montgomery County. Under a direct smoking ban, a patron who smokes in a restaurant him- or herself commits a violation of the no-smoking ordinance. However, I also noted that nothing in Virginia law prevents a restaurant owner from prohibiting smoking throughout the establishment. A patron who disregards such an owner-imposed ban and refuses to leave the premises commits a trespass, and not a no-smoking violation.

On June 27, 2006, the Surgeon General of the United States issued a comprehensive scientific report which concluded that there is no risk-free level of exposure to secondhand smoke, and that even brief secondhand smoke exposure can cause immediate harm. In addition, there appears to be abundant evidence of the inadequacy of many existing restaurants' no-smoking policies to protect nonsmoking patrons and workers from secondhand smoke. Almost three-quarters of Americans who live and work in the top 100 metropolitan areas in this country are protected by law from any exposure to secondhand smoke in restaurants and attached bars, including those in Boston, New York, Philadelphia, Washington, D.C. and Montgomery County, Maryland. In a July 24, 2006 editorial, *Nation's Restaurant News*, a leading industry publication, acknowledged mounting evidence which shows that smoke-free restaurant policies in fact help increase business, and concluded that it was time for restaurant trade associations and operators to abandon their historical opposition to such policies. The confluence of these developments

strongly suggests that in a metropolitan area such as this, a jurisdiction where smoking is permitted in restaurants and bars is likely, overall, to suffer an economic disadvantage vis-à-vis jurisdictions which have a uniform ban.

Based on these factors, I have concluded that the City does have the authority, as part of its Zoning Ordinance, to require that restaurants and bars in the City operate as smoke-free establishments. Accordingly, the proposed amendment to the Zoning Ordinance would require the following:

1. All new restaurants and bars must agree, as a condition of their SUP, to operate as smoke-free establishments.
2. Every existing restaurant or bar governed by an existing SUP, which seeks an SUP amendment, or is subject to a mandatory SUP review, must agree to operate as a smoke-free establishment, within three months after the approval of the amendment or review.
3. Every existing restaurant and bar which uses the public right-of-way for outdoor seating must agree to operate as a smoke-free establishment within three months after the effective date of the ordinance.
4. Every "grandfathered" restaurant, i.e., one which predates the SUP requirement, must agree to operate as a smoke-free establishment within three months of the effective date of the ordinance, or will lose its favored "grandfathered" status, and become a non-conforming use, subject to restrictions on replacing and upgrading its equipment, and to a seven-year abatement period.
5. Every existing restaurant which operates pursuant to an existing SUP, must agree to operate as a smoke-free establishment within three months of the effective date of the ordinance, or will become a non-conforming use, subject to restrictions on replacing and upgrading its equipment, and to a seven-year abatement period.
6. Every existing restaurant which changes its ownership, name, liquor license holder, or type or style of cuisine, will be treated as a new restaurant.

The rationale for the proposed regulations is that restaurants which receive a zoning permit or some other benefit from the City must, as a condition of receiving or retaining that permit or benefit, agree to operate as a smoke-free establishment. Existing restaurants which do not so agree may continue to operate, but will be severely restricted, and in some cases effectively precluded, from making any significant changes or improvements to the restaurant, and may be required to cease existing operations after seven years.

Cc: James K. Hartmann
City Manager

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Interim Director of Planning and Zoning

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Health Director

Bernard Caton
Legislative Director

CITY OF ALEXANDRIA
PROPOSED SMOKE-FREE RESTAURANT ACT

[THE FOLLOWING IS ALL NEW LANGUAGE.]

Section 2-100 Definitions.

- 2-190.1 Restaurant, smoke-free. A restaurant which does not permit patron or employee smoking within or on the premises, including without limitation in any bar, lounge, dining, patio, outdoor seating, waiting, storage or other area, except for exterior sidewalks and parking areas 20 feet or more from an entrance, operable window, patio or outdoor seating area.
- 2-193.1 Smoking. The act of smoking or carrying a lighted or smoldering cigar, cigarette or pipe of any kind, or lighting a cigar, cigarette or pipe of any kind.

Section 7-2200 Smoke-free restaurants required.

- 7-2201 Any new restaurant for which a special use permit pursuant to Section 11-500, or for which an administrative permit pursuant to Section 6-600, Section 6-700 or Section 6-800, or for which a building permit pursuant to Section 4-700 of this ordinance, is approved after [effective date] shall, as a condition of such permit, agree to operate as a smoke-free restaurant.
- 7-2202 Any restaurant existing on [effective date] for which a special use permit pursuant to Section 11-500, or for which an administrative permit pursuant to Section 6-600, Section 6-700 or Section 6-800, or for which a building permit pursuant to Section 4-700 of this ordinance, is approved, reviewed or amended after [effective date] shall, as a condition of such permit, agree to operate as a smoke-free restaurant, within three months after the approval, review or amendment of such permit.
- 7-2203 Every restaurant with outdoor seating located in the public right-of-way existing on [effective date] shall, as a condition of the continued right to use the public right-of-way, agree to operate as a smoke-free restaurant within three months after [effective date].
- 7-2203 Every grandfathered restaurant existing on [effective date] shall, as a condition of the continued right to be classified as a grandfathered use, agree to operate as a smoke-free restaurant within three months of [effective date].
- 7-2204 Every restaurant existing on [effective date] for which a special use permit pursuant to Section 11-500, or for which an administrative permit pursuant to Section 6-600, Section 6-700 or Section 6-800, or for which a building permit

1 pursuant to Section 4-700 of this ordinance, has been approved, shall agree to
2 operate as a smoke-free restaurant within three months of [effective date].
3

4 7-2205 Every restaurant which is not a smoke-free restaurant as required pursuant to
5 Section 7-2203 and Section 7-2204 shall be classified as a nonconforming use
6 subject to Section 12-214 of this ordinance.
7

8 7-2206 For purposes of this Section 7-2200, "a restaurant existing on [effective date]"
9 shall not be deemed to include a new restaurant at the same location as a
10 restaurant which operated on [effective date]. Indicia of a new restaurant shall
11 include, without limitation, a change in ownership or control, a change in name, a
12 change in Virginia Alcoholic Beverage Control Board licensee, or a change in
13 type or style of cuisine.
14

15 7-2207 The provisions of this Section 7-2200 shall preempt any contrary provisions of the
16 City Code or this ordinance.